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Nos. 88-533 and 88-549

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

THERESE U. DONNELLY, PETITIONER

v.

EKLUTNA, INC., ET AL.

JAMES W. LEE, PETITIONER

v.

EKLUTNA, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner Donnelly's suit against the United States claiming title to land under the homestead laws is barred by the 12-year statute of limitations in the Quiet Title Act, 28 U.S.C. 2409a(g) (Supp. IV).

2. Whether the United States is an indispensable party to petitioner Donnelly's quiet title suit against the respondent Alaska Native corporations that hold the disputed land under patents issued by the United States pursuant to the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 *et seq.*

3. Whether a person who is a trespasser on federal land that previously was withdrawn for a special federal purpose and then was patented to a Native corporation under ANCSA can obtain title to the surface estate under Section 14(c) of ANCSA.

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No. 88-533

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-17a) is reported at 850 F.2d 1313. The opinions and findings of the district court (Pet. App. 18a-86a) are unreported.

JURISDICTION

The decision of the court of appeals was rendered on March 10, 1988, and a timely petition for rehearing was denied on June 27, 1988 (Pet. App. 4a, 94a-97a). The peti-

tion for a writ of certiorari was filed on September 24, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

These cases concern the ownership of several parcels of land in the Eagle River Valley near Anchorage, Alaska. The parcels in question are part of a tract that was patented by the United States in 1979 to respondent Eklutna, a Native corporation that was established under the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 *et seq.* Prior to 1979, however, the land was included in Power Site Classifications 107 and 399, which were issued in 1925 and 1950, respectively, pursuant to 43 U.S.C. 31 and Section 24 of the Federal Power Act, 16 U.S.C. 818. Pet. App. 18a-19a. The background of these two cases is essentially identical to that of *Lee* v. *United States*, 629 F. Supp. 721 (D. Alaska 1985), aff'd, 809 F.2d 1406 (9th Cir. 1987), cert. denied, No. 87-642 (Jan. 27, 1988) [hereinafter *Lee I*], and No. 88-549 involves the same petitioner and the same parcel of land as *Lee I*.

1. Section 24 of the Federal Power Act provides that land included in a proposed power project site shall be "reserved from entry, location, and other disposal under the laws of the United States * * *." The issuance of Classifications 107 and 399 therefore had the effect of withdrawing the parcels at issue in this case from entry under the public land laws. Section 24 of the Federal Power Act further provides that if the Federal Power Commission (FPC)[1] determines that any of the land set

[1] The FPC has been abolished and its duties transferred to the Secretary of Energy and the Federal Energy Regulatory Commission. See 42 U.S.C. 7151(b), 7171(a), 7172(a), 7291 and 7293.

aside for a power site will not be injured or destroyed for purposes of power development if it is made available for location, entry, or selection under the public land laws, the Secretary of the Interior, after giving 90 days' notice to the Governor of the State, shall declare the land open to entry under those laws. In 1952, the FPC determined that certain of the land covered by Power Site Classifications 107 and 399 would not be injured for purposes of power development by location or entry under the public land laws. However, the Secretary of the Interior did not thereafter revoke the withdrawal and declare the land open for entry or settlement. Pet. App. 5a.[2]

In 1957, petitioner Donnelly[3] and petitioner Lee moved onto separate tracts of land in the Eagle River Valley, with the expectation of homesteading those tracts. Some of the land on which each petitioner settled was open for homesteading. However, in 1957 and 1958, the Bureau of Land Management (BLM) informed petitioners that other portions of the proposed homestead sites—the portions at issue here—were within the power site classifications and for that reason would not be available until BLM formally opened them for entry. Although petitioners were invited to appeal, they did not do so. Pet. App. 34a, 63a-65a; *Lee I*, 809 F.2d at 1407.

Petitioners Donnelly and Lee did, however, file renewed homestead applications for the same parcels. At the same time, petitioners resorted to political channels, joining with other would-be homesteaders in the area in writing to members of the Alaska congressional delegation and to

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[2] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 88-533.

[3] Upon his death, Joseph F. Donnelly, the original party in interest, was succeeded by his wife, Therese U. Donnelly. For ease of reference, however, we refer to Joseph Donnelly as "petitioner."

the Secretary of the Interior. Responding to these inquiries, both the Director of BLM and the Assistant Secretary of the Interior reiterated that petitioners had no rights in land within the power-site withdrawal. The Director of BLM explained to Delegate (later Senator) Bartlett that "[i]n the absence of special legislation, we know of no way of assuring the Lees and the Donnellys of continued occupancy of the lands for homestead purposes. Any settlement on power-site lands which have not been opened to entry is a trespass against the United States and no rights can be gained thereby" (Pet. App. 67a-68a). The Assistant Secretary also informed a representative of homestead applicants in the area that portions of their proposed homestead sites were not open to entry; that further action by the Department of the Interior with respect to the land would have to await completion of an engineering survey; and that even if the power-site withdrawal were revoked, the State of Alaska and veterans would have preference rights (*id.* at 36a, 69a-70a, 113a-114a; *Lee I,* 809 F.2d at 1407). In 1959, BLM informed petitioner Donnelly that his second homestead application was invalid and that "any use or occupancy of these lands will constitute a trespass against the United States" (Pet. App. 70a-71a; see also *id.* at 35a). Donnelly once again did not take an appeal pursuant to administrative procedures (*id.* at 71a-72a). Petitioner Lee's application was similarly rejected in 1961 (*id.* at 36a).

In 1961, after publishing notice in the Federal Register, BLM filed a platted survey of the area that delineated, inter alia, the boundaries of Classifications 107 and 399 in relation to the potential homestead sites selected by petitioners. 26 Fed. Reg. 2486. Soon thereafter, BLM notified petitioner Donnelly that upon finalization of the survey, it would permit him to file a renewed homestead application for the land outside the power-site withdrawal (Pet. App.

72a-74a). BLM made clear, however, that "[t]his notice is not to be construed as granting any rights or concessions to the withdrawn lands" (*id.* at 73a). In 1964, both petitioners entered into compromise arrangements with BLM that enabled them to submit proof of occupancy for those portions of the proposed homestead entries that were located outside the withdrawal area and to receive patents from the United States for those portions (*id.* at 13a-14a, 37a). Under this arrangement, petitioner Donnelly received a patent to 67.5 acres of the land in his original 160-acre homestead claim and petitioner Lee received a patent to 95 acres of his original 160-acre claim (*id.* at 6a, 38a). The instant petitions concern only the portions of the 160-acre sites selected by Donnelly and Lee that were within the power-site withdrawal area.

2. On December 18, 1971, Congress enacted ANCSA, which was intended to settle the aboriginal land claims of Native Alaskans. Under Section 4 of the ANCSA, 43 U.S.C. 1603, all claims of aboriginal title in Alaska were extinguished. See *Amoco Production Co.* v. *Village of Gambell*, No 85-1239 (Mar. 24, 1987), slip op. 3-4. At the same time, Congress provided for regional and village Native corporations organized under ANCSA to select and receive title to public land in Alaska, including land within certain power-site withdrawals. See 43 U.S.C. 1602(e), 1610-1614.[4] In addition, Section 22(b) of ANCSA

[4] ANCSA permits each Native village corporation to select a minimum of 69,120 acres of public land from lands withdrawn under the Act. 43 U.S.C. 1611(a)(1), 1613(a). ANCSA defines "public land" as "all Federal lands and interests therein located in Alaska," except the smallest practicable tract surrounding any federal facility and land selected by the State of Alaska under its Statehood Act. 43 U.S.C. 1602(e). Power-site withdrawals are "public land" under this definition, and they therefore may be selected by a Native corporation under ANCSA.

directed the Secretary of the Interior to issue patents to all persons who had made lawful entry in compliance with the public land laws for the purpose of gaining title to homesteads, headquarter sites, trade and manufacturing sites, or small tract sites (43 U.S.C. 1621(b)). These patents were to issue promptly after ANCSA was passed, so that the Native corporations could select lands with the assurance that they would not be patented to others.

Pursuant to Section 14 of ANCSA, 43 U.S.C. 1613, the Native village corporation of Eklutna filed a land selection that included the parcels at issue here. In 1979, the United States issued Eklutna a patent to the surface estate in the land and issued respondent Cook Inlet Region, Inc., the regional Native corporation for the area, a corresponding patent to the subsurface estate. *Lee I,* 809 F.2d at 1408.

3. a. In 1975, the United States filed a trespass action against petitioner Donnelly with respect to the 92.5 acres he claimed within the power-site withdrawal. Later that year, Donnelly filed a counterclaim against the United States under the Quiet Title Act (QTA), 28 U.S.C. 2409a, seeking to quiet title to the disputed land in himself. In 1979, after the United States patented the land to Eklutna under ANCSA, petitioner also filed a counterclaim against Eklutna (which had intervened to protect its interest in the disputed land), as well as a second amended counterclaim against the United States. In its final form, petitioner Donnelly's counterclaim against the United States sought to (i) quiet title in petitioner to the portion of the Native corporation's land for which petitioner had sought to make a homestead entry some years earlier; (ii) force the Department of the Interior to invalidate Eklutna's patent for the same land, accept petitioner's homestead application, and patent the land to Donnelly instead; and (iii) enjoin the government from disturbing his use and occupancy of the land. Petitioner Lee also filed a direct action

against the United States and Eklutna raising similar claims.

b. On January 25, 1980, after the United States patented the disputed land to Eklutna, the district court granted the government's motion to dismiss its trespass claim against Donnelly. Pet. App. 6a. Following a bench trial, the court also dismissed Donnelly's counterclaims against the United States and Eklutna (*id.* at 6a-7a). The district court held that it lacked jurisdiction over Donnelly's claim against the United States because it was barred by the 12-year statute of limitations under the QTA, now codified at 28 U.S.C. 2409a(g) (Supp. IV) (Pet. App. 23a). The district court reaffirmed that ruling in its December 5, 1986 opinion (*id.* at 50a-57a), finding that petitioner "knew or should have known of the claim of the United States" at least by 1958, when BLM rejected his original homestead entry, or, at the latest, by 1961, when BLM completed its survey covering the contested land and published notice of the survey in the Federal Register (*id.* at 52a).

The district court also rejected petitioner Donnelly's claims against respondent Eklutna (Pet. App. 31a, 32a-49a, 50a-57a). The court first dismissed petitioner's challenge to Eklutna's patent because petitioner was jurisdictionally barred by the QTA's statute of limitations from establishing that his title was valid as against the United States (*id.* at 31a, 51a n.1). The court later reaffirmed that dismissal, and further held that the federal common-law basis for petitioner's claim against respondent Eklutna had been preempted by ANCSA, and that petitioner could not assert a claim against Eklutna under Section 22(b) of ANCSA because that provision imposes duties only on the Secretary of the Interior, not on Native corporations (Pet. App. 52a-53a).[5] In a decision rendered

[5] The court noted in passing that even if petitioner Donnelly had filed a Section 22(b) claim against the Secretary, his claim would have

on January 23, 1985, the district court rejected similar claims by petitioner Lee against the United States and Eklutna. *Lee I*, 629 F. Supp. 721.

c. Finally, in a decision rendered on November 13, 1986, the district court rejected the remaining contention advanced by both Lee and Donnelly—namely, that they were entitled to receive title to the surface estate in the disputed parcels under Section 14(c)(1) of ANCSA. That Section provides that upon receipt of the patent, a village corporation shall first convey to any Native or non-Native occupant, without consideration, title to the surface estate in a tract that was occupied as of December 18, 1971, "as a primary place of residence, or as a primary place of business, or as a subsistence campsite, or as headquarters for reindeer husbandry" (43 U.S.C. 1613(c)(1)). The district court held that "mere physical presence" is not sufficient to constitute "occupancy" for purposes of Section 14(c)(1) and that Congress did not intend Section 14(c)(1) to apply to "mere[] trespassers, failed homesteaders, or land users without any vested rights prior to 1971" (Pet. App. 43a, 49a).

4. Petitioner Lee's claims against the United States and Eklutna—except for his claim against Eklutna seeking title to the surface estate under Section 14(c)(1) of ANCSA—were the subject of a separate appeal, which was decided by the court of appeals on April 17, 1987. *Lee I*, 809 F.2d 1406. In that decision, the court of appeals agreed with the district court that petitioner Lee's suit against the United States was barred by the 12-year statute of limitations in the QTA, because he knew or should have known of the United States' claim by 1961, when the notice

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been barred by the QTA's 12-year statute of limitations (Pet. App. 53a n. 2).

of survey was published in the Federal Register (809 F.2d at 1410). The court of appeals also affirmed the district court's dismissal of Lee's action against Eklutna to quiet title to the 65 acres Lee claimed within the power-site withdrawal, on the ground that the United States was an indispensable party that could not be joined because of the bar created by the QTA's 12-year statute of limitations (*id.* at 1410-1411). This Court denied Lee's petition for a writ of certiorari seeking review of these rulings by the court of appeals in *Lee I (Lee* v. *Eklutna, Inc.,* No. 87-642 (Jan. 27, 1988)), and Lee (unlike Donnelly) no longer challenges those rulings.

5. The decision of the court of appeals at issue here was rendered almost a year later, on March 10, 1988 (Pet. App. 1a-17a). In that decision, the court first affirmed the district court's dismissal of petitioner Donnelly's quiet title claims against the United States and Eklutna, which were essentially identical to those rejected in *Lee I.* Adopting its reasoning in *Lee I,* the court held that Donnelly's action against the United States is barred by the 12-year statute of limitations under the QTA, since he knew or should have known of the United States' adverse claim when the notice of survey was published in the Federal Register in 1961 (*id.* at 11a-14a), and that Donnelly's title action againt Eklutna cannot proceed because the United States is an indispensable party that cannot be joined because of the QTA's 12-year statute of limitations (*id.* at 14a-15a).

The court of appeals also affirmed the district court's dismissal of the claims against Eklutna by both petitioner Donnelly and petitioner Lee seeking title to the surface estate of their respective parcels under Section 14(c)(1) of ANCSA (Pet. App. 15a-17a). The court held that Section 14(c)(1), which requires Native corporations to convey surface rights to certain "occupants" of land patented to

the corporations, does not operate as an "amnesty provision" for individuals who are trespassers or failed homesteaders (Pet. App. 15a). The court explained that it found "no indication of congressional intent to override the established principle that individuals could obtain no rights to withdrawn lands," and that "the congressional intent to provide a 'just and fair settlement' of native land claims is inconsistent with an interpretation of § 14(c)(1) that would reduce the land patented to native corporations in favor of trespassers" (*id.* at 15a-16a (citation and footnotes omitted)). The court of appeals acknowledged petitioners' contention that they were not trespassers because the Secretary was required to revoke the power-site withdrawal in the 1950s and issue homestead patents to them, and that they therefore had equitable title to the disputed parcels. But the court held that, under its decision in *Lee I*, the United States is an indispensable party to an action seeking to establish petitioners' equitable title and that the United States cannot be joined because of the 12-year statute of limitations under the QTA (*id.* at 16a).[6]

ARGUMENT

The court of appeals correctly held that petitioner Donnelly's quiet-title action against the United States is barred by the 12-year statute of limitations under the Quiet Title Act and that his quiet title action against respondent Eklutna is barred because the United States is an indispensable party to such a suit and cannot be joined. The court of appeals' rulings on these issues do not conflict with any

[6] The court of appeals also rejected petitioner Donnelly's "constructive trust" claim against respondent Eklutna. Relying on the district court's decision in *Lee I* (629 F. Supp. at 728-729), the court held that ANCSA "occupies the field" in this area and preempts federal common-law claims (Pet. App. 16a).

decision of this Court or of another court of appeals, and they present no question of general importance warranting review by this Court. In fact, the Court last Term denied petitioner Lee's petition for a writ of certiorari challenging the court of appeals' identical rulings in *Lee I* (*Lee* v. *Eklutna, Inc.*, No. 87-642 (Jan. 27, 1988)), and there is no reason for a different disposition here. The attempt by both petitioners to avoid the result in *Lee I* by seeking title to the surface estate of the disputed parcels under Section 14(c)(1) of ANCSA likewise does not warrant review. The court of appeals' decision denying relief under Section 14(c)(1) in the circumstances of this case does not conflict with any decision of this Court or of another court of appeals and does not involve considerations of general importance under ANCSA. The petitions for a writ of certiorari therefore should be denied.

1. Petitioner Donnelly contends (88-533 Pet. 9-18, 23-25) that he has equitable title to the 97.5-acre portion of his original homestead claim that was within the powersite withdrawal, because the Secretary of the Interior should have revoked the withdrawal in the 1950s and issued him a homestead patent to the disputed parcel. The court of appeals properly denied Donnelly relief on that claim, both against the United States and against respondent Eklutna.

a. The court of appeals correctly held that Donnelly's claim against the United States is barred by the 12-year statute of limitations in the Quiet Title Act (Pet. App. 11a-14a). Under 28 U.S.C. 2409a(g) (Supp. IV), any QTA action is barred "unless it is commenced within twelve years of the date upon which it accrued," and an action "shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." Both courts below

found that Donnelly knew or should have known of the United States' adverse claim to the land in 1958, when BLM denied his first homestead application (Pet. App. 65a-68a); in 1959, when BLM rejected his second homestead application and notified him that continued occupancy would be a trespass against the United States (*id.* at 70a-71a); or, at the latest, in 1961, when BLM published and recorded its survey describing the disputed area as withdrawn (*id.* at 72a). See *id.* at 13a, 23a, 52a. Each of those dates was more than 12 years prior to 1975, when Donnelly first sought to have the court quiet title in him, as against the United States. Donnelly's QTA claim against the United States therefore is time-barred.

Furthermore, petitioner Donnelly's attempt to obtain relief against the United States under the QTA is essentially identical to that made by petitioner Lee but rejected by both courts below in *Lee I*. In the late 1950s, both Lee and Donnelly sought to obtain homestead patents to 160-acre parcels that included some land that was not subject to entry under the homestead laws because it had been withdrawn as a potential power site. BLM therefore denied the homestead applications of both petitioners for the full 160 acres, although both petitioners ultimately were issued homestead patents to the portions of their respective parcels that fell outside the power-site withdrawal. Despite BLM's unequivocal rejection of their applications for a patent to the land within the power-site withdrawal and the publication in the Federal Register of a survey specifically marking the scope of the United States' claim, both petitioners failed to take timely action to preserve any claims they may have had to the portions within the power-site withdrawal. This Court declined to review the holding by both courts below that Lee's quiet title claim against the United States therefore was time-

barred, and the identical fact-bound claim is no more worthy of review here.

Contrary to Donnelly's submission (88-533 Pet. 23-24), the communications with government officials after 1959 concerning his homestead entry did not constitute an administrative appeal of the Department's rejection of his application for land within the power-site withdrawal. Petitioner in fact took no appeal of BLM's rejection of his 1959 application. Indeed, in the district court, petitioner acknowledged that he knew of the government's adverse claim based on the power-site withdrawal and that he deliberately decided not to appeal: he stated that he took no appeal because he "could not be expected to repeatedly appeal a matter on which the Secretary of the Interior had spoken so conclusively in 1959" (Clerk's R. 251, at 7).

During and after 1959, Donnelly sought to obtain a different result through political, not legal channels, by writing letters to his congressional representatives and the Secretary. In every communication to or about petitioner Donnelly in response to these inquiries, the Department of the Interior reiterated that the land within the power-site withdrawal was not available for homestead entry and that continued occupancy of that land constituted a trespass against the United States. See pages 3-4, *supra*. The Department did undertake to ascertain how much of the 160-acre area sought by Donnelly fell outside the withdrawn area, so that this land—which was open to homestead entry—could be patented to him. But it was clear at all times that this undertaking by the Department did not constitute an appeal by Donnelly of the Department's rejection of his application for lands inside the withdrawn area. See 43 C.F.R. 221.1 *et seq.* (1958); *Department of the Interior Circular 1950,* 21 Fed. Reg.

1860 (Mar. 27, 1956); *Davis* v. *Nelson*, 329 F.2d 840, 847 (9th Cir. 1964).[7]

Petitioner Donnelly's related argument (88-533 Pet. 23-24) that he was entitled to individualized notice and that he therefore was not sufficiently put on notice by the March 15, 1961, publication in the Federal Register of the government's claim to the withdrawn area is also without merit. The primary purpose of the Federal Register is to furnish notice to the world of its contents, and the world is therefore charged with such notice. See 44 U.S.C. 1507; *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384-385 (1947); *Kuehner* v. *Heckler*, 778 F.2d 152, 161 (3d Cir. 1985). See also *Government of Guam* v. *United States*, 744 F.2d 699, 701 (9th Cir. 1984) (publication of United States' claim in Federal Register triggered running of QTA's limitations period). Petitioner had no pending appeal at the time of the publication in the Federal Register; but even if he did, one who is involved in ongoing dealings with an agency surely should not be held to a lesser standard of notice than the world at large. Any other rule would completely undermine the Federal Register's function of furnishing official notice to citizens at large of the

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[7] Donnelly erroneously relies (88-533 Pet. 23-24) on a departmental notice to him dated May 12, 1961. That notice stated that Donnelly was not then required to reduce his application to cover only land outside the power-site withdrawal, because a survey was contemplated; but the notice expressly stated that it was "not to be construed as granting any rights or concessions to the withdrawn area" and that at the completion of the investigation, a new decision with an appropriate appeal period would be issued "calling for an application to enter on the lands not withdrawn" (Pet. App. 87a-88a). This notice, which was sent to Donnelly more than 12 years before he filed his QTA claim, thus made clear that the Department continued to reject any claim to lands that *were* withdraw ..

government's actions and decisions. Moreover even if Donnelly's argument regarding the Federal Register notice were sound, the judgment of the court of appeals would still be correct: as that court further held (Pet. App. 13a-14a), Donnelly already had personal notice sufficient to trigger the QTA's limitations period as of 1959, when BLM notified him for the second time that his homestead entry had been rejected.[8]

b. Petitioner Donnelly further contends (88-533 Pet. 9-11, 14-18) that even if his QTA claim against the United States was properly dismissed, his suit against respondent Eklutna should have been permitted to continue. In particular, Donnelly argues (*id.* at 9-11) that the court of appeals erroneously held that his quiet title suit against Eklutna is subject to and barred by the 12-year statute of limitations in the QTA. Donnelly mischaracterizes the basis of the decision below. The court of appeals did not hold that the 12-year statute of limitations that governs QTA suits against the United States is directly applicable to Donnelly's quiet title suit against Eklutna. Rather, relying on its prior decision in *Lee I,* the court simply held that the United States is an indispensable party to Donnelly's

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[8] Donnelly also contends (88-533 Pet. 12-13) that his claim seeking a patent from the United States should be governed by the statute of limitations in ANCSA (43 U.S.C. 1632(a)), which provides that a decision of the Secretary under ANCSA shall not be subject to judicial review unless such review is initiated within two years. In Donnelly's view, his claim is timely under Section 1632(a) because it was filed before the expiration of two years after the Secretary issued the patent to respondent Eklutna in 1979. However, as we explained in response to petitioner Lee's identical argument in *Lee I* (87-642 Br. in Opp. 9 n.5), Section 1632(a) was intended to *limit* claims; it was not intended to *revive* claims against the United States that were already barred by another statute (*e.g.*, the QTA) at the time the Secretary rendered the relevant decision under ANCSA.

quiet title suit against Eklutna but that the United States cannot be joined as a defendant because the QTA's statute of limitations bars Donnelly's claim against the United States (Pet. App. 14a-15a, quoting 809 F.2d at 1410-1411).

Donnelly does not even mention, much less rebut, the indispensable-party basis for the court of appeals' decision dismissing his quiet title claim against Eklutna. There accordingly is no reason for the Court to grant review of the court of appeals' judgment in that respect, especially since the Court has already denied review of that issue in *Lee I*. Moreover, as we explained in our brief in opposition in *Lee I* (87-642 Br. in Opp. 12-16), the indispensable-party holding in *Lee I* (and therefore in this case) is correct under Fed. R. Civ. P. 19. The United States plainly has an "interest" (within the meaning of Rule 19(a)) in Donnelly's suit against Eklutna, because if he were to succeed in this case and thereby deprive Eklutna of its title to the 97.5 acres, Eklutna would be entitled to receive other land from the United States to compensate for that diminution of its statutory entitlement. See 87-642 Br. in Opp. 13-14 & n.1. Because the United States therefore is a necessary party, but cannot be joined as a defendant in Donnelly's suit to establish his title because of the QTA's statute of limitations, it is necessary to determine whether "in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable" (Fed. R. Civ. P. 19(b)).

A weighing of the four factors that are among those to be considered in making a determination under Rule 19(b) establishes that the dismissal in this case was proper. The potential prejudice to the United States is clear, because if Donnelly were to prevail in his suit against Eklutna, the United States would stand to lose its title to an equivalent amount of land. Nor can relief be shaped in a way that

would lessen the harm to the United States. The remaining two factors identified in Rule 19(b) might be thought to weigh in favor of allowing the suit to proceed, since the court presumably could enter an adequate judgment in the absence of the United States and Donnelly does not have an adequate remedy at the present time if his suit against Eklutna is dismissed. However, the latter factor is scarcely compelling, because Donnelly plainly did have an adequate remedy in the form of a suit against the United States under the QTA, but he voluntarily allowed the time for filing such a suit to expire. Moreover, Rule 19(b) in the end requires a court to rely on "equity and good conscience" in determining whether a suit should be dismissed because of the absence of a necessary party. Here, because petitioner's problems are of his own making, and because any judgment entered in favor of Donnelly against Eklutna would ultimately redound to the detriment of the United States, the court of appeals' conclusion that the United States is an indispensable party in the circumstances of this case is amply supported by "equity and good conscience." In any event, the question whether the United States is an indispensable party under the particular statutory and regulatory framework implementing the selection rights of Alaska Native corporations is not one of general importance that warrants review by this Court.[9]

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[9] Donnelly relies (88-533 Pet. 14-18) on a common-law theory of constructive trust in seeking to wrest title to the 97.5 acres from respondent Eklutna. However, as we explained in *Lee I* in response to petitioner Lee's reliance on the same constructive-trust theory and cases (see 87-642 Br. in Opp. 12), this argument ignores the particular factual circumstances and statutory framework of this case. Even if a federal common-law constructive-trust action against the patentee survived the enactment of ANCSA and the QTA, the United States would be an indispensable party to such an action because the United

2. Petitioner Donnelly and petitioner Lee both contend (88-533 Pet. 18-23; 88-549 Pet. 11-27) that even if they cannot succeed on their claim that they already have equitable title to the disputed parcels (on the theory that the Secretary was required to rescind the power-site withdrawal in the 1950s and immediately issue them homestead patents that included those parcels), respondent Eklutna is required to convey the title to the surface estate in those parcels to them under Section 14(c)(1) of ANCSA.[10] This effort by petitioners to avoid the consequences of their failure to press their homestead claims against the United States in a timely manner does not warrant this Court's attention.

a. Petitioners first appear to suggest (88-533 Pet. 20, 21-22; 88-549 Pet. 7, 20-21, 25) that the court of appeals held (i) that a plaintiff may not bring an action under Section 14(c)(1) of ANCSA to compel a Native village corporation to convey title to the surface estate unless the plaintiff also brings a quiet title action against the United States to establish that he already has title to the land; and (ii) that an action against the village corporation therefore

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States would be required to convey an additional amount of land to the Native corporation to compensate for any land that the corporation was found to hold in constructive trust for Donnelly. Moreover, both courts below held that under the rationale of *Milwaukee* v. *Illinois*, 451 U.S. 304, 313-319 (1981), a federal common-law constructive-trust action does not survive the enactment of ANCSA, because ANCSA occupies the field of disputed title to lands selected by Native corporations (Pet. App. 16a; *Lee I*, 629 F. Supp. at 728-729).

[10] Section 14(c)(1) provides that a Native village corporation to which a patent has been issued shall first convey to a Native or non-Native occupant the title to the surface estate that was occupied as of December 18, 1971, "as a primary place of residence, or as a primary place of business, or as a subsistence campsite, or as headquarters for reindeer husbandry" (43 U.S.C. 1613(c)(1)).

will always be barred if an action against the United States with respect to the same land does not lie under the QTA. Petitioners are mistaken if they actually read the court of appeals' opinion in this manner, which would effectively render the United States an indispensable party to every suit under Section 14(c)(1).

We agree with petitioners that suits under Section 14(c)(1) are disputes that arise principally between the Native village corporation and the plaintiff asserting occupancy rights, since the village corporation's duty to convey title to the surface estate arises only after the United States has issued a patent to the corporation. We further agree that the United States is not an indispensable party to an ordinary suit under Section 14(c)(1), since if the plaintiff obtains title to the surface estate he actually occupies, the United States is not obligated to issue a patent to the Native corporation for an additional amount of land. In this respect, suits by third parties to obtain title to the surface estate in the first instance under Section 14(c)(1), based on past occupancy, differ from quiet-title and similar suits by third parties claiming that they *already* have title to the land and that the United States therefore could not convey title to the Native corporation in the first place.

Contrary to petitioners' apparent contention, however, the court of appeals did not hold otherwise in this case. The court did not dismiss petitioners' Section 14(c)(1) claims because of the absence of an indispensable party (the United States) that could not be sued. It instead rejected petitioners' Section 14(c)(1) claims *on the merits*, concluding that that Section does not afford amnesty relief to persons whose homestead claims were barred because the land for which they applied had been withdrawn for a special federal purpose and who therefore were tres-

passers on the unavailable land. Pet. App. 15a-16a. Petitioners sought to answer this reasoning by contending that they were not in fact trespassers because they had equitable title to the land, on the theory (which the court of appeals had already found to be barred) that the Secretary was required to revoke the power-site withdrawal in the 1950s and patent the parcels to petitioners under the homestead laws (*id.* at 16a). It was only in response to that claim by petitioners of preexisting *title*, rather than merely past occupancy, that the court of appeals then discussed petitioners' inability to establish title to the parcels because the QTA's 12-year statute of limitations bars a quiet title action against the United States (*ibid.*). The court did not suggest that the ability to bring a timely quiet-title suit against the United States is a prerequisite to Section 14(c)(1) suits generally. This reading of the opinion below is confirmed by the Ninth Circuit's subsequent decision in *Buettner* v. *Kavilco, Inc.*, No. 87-4435 (Oct. 26, 1988), in which it decided the merits of a claim under Section 14(c)(1) without any suggestion that the absence of the United States as a party presented a jurisdictional or procedural defect. The Supreme Court of Alaska likewise has decided a Section 14(c)(1) claim on the merits without any suggestion that the absence of the United States presented an obstacle to its doing so. *Hakala* v. *Axtam Corp.*, 753 P.2d 1144 (1988). Accordingly, the decision below does not warrant review on any question involving the status of the United States as an indispensable party under Section 14(c)(1).

b. Nor does the court of appeals' rejection of petitioners' Section 14(c)(1) claims on the merits warrant review by this Court. Because suits under Section 14(c)(1) are principally between the plaintiff and the Native village corporation and do not directly involve the United States,

the United States did not take a position in the court of appeals on the merits of petitioners' claims under Section 14(c)(1), and we do not take a definitive position on the scope of that Section here. However, whatever may be the application of Section 14(c)(1) to other persons who might be termed "trespassers" on federal lands, the circumstances of this case do lend particularlized support to the court of appeals' rejection of petitioners' claims and serve to distinguish those claims from others that have arisen or may arise under Section 14(c)(1).

This case involves land that had long been withdrawn from entry under the public land laws at the time it was patented to respondent Eklutna in 1979, and petitioners had been repeatedly informed, beginning more than 20 years earlier, that they had no rights in the land and were trespassers on it. In fact, the United States brought a trespass action against petitioner Donnelly in 1975, four years before the land was patented to Eklutna. As a result, petitioners did not have the sort of expectation of continued possession that Section 14(c)(1) was intended to protect. Indeed, petitioners were specifically informed when their homestead applications were denied in the late 1950s that if the power-site withdrawal were subsequently revoked, as petitioners urged, they would not necessarily receive a homestead patent to the land they sought within the withdrawal area, because other persons—the State of Alaska and veterans—would have preference rights to select the same land. See page 4, *supra*. The effect of the court of appeals' interpretation of Section 14(c)(1) in this case is simply to recognize an additional person (respondent Eklutna) who also was given a preference right to select the land. Accordingly, the Section 14(c)(1) claims in this case are quite different from those that might be advanced in other cases by persons who built a home or

engaged in business on land in the public domain that had not been withdrawn for a special federal purpose.

Moreover, even if the court of appeals erred in concluding that Section 14(c)(1) is wholly inapplicable to land within a power-site withdrawal, it does not follow that Section 14(c)(1) would support a claim to more than the land on which a residence or place of business was actually built, as well as the immediately adjacent area (the curtilage). Compare *Buettner* v. *Kavilco, supra* (involving "lots" on which homes had been built); *Halaka* v. *Axtam Corp., supra* (holding that only the business site and the surrounding curtilage were covered by Section 14(c)(1)). In particular, there is substantial reason to doubt that Section 14(c)(1) was intended to afford a basis for obtaining title to the surface estate in an entire 160-acre homestead claim (or the 97.5-acre and 65-acre portions of such a claim that petitioners seek in this case), which would encompass far more than the residence or business and the curtilage.[11] In fact, petitioner Lee, in response to a notice of trespass served by the government, removed his improvements from the parcel within the withdrawal area in November 1971 (Pet. App. 39a-40a). He therefore did not even have a residence or business on the land he claims to

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[11] These factors may distinguish the claims of most if not all of the 59 individuals who have filed a brief as amici curiae in this case. That brief does not disclose how many (if any) such claims involve land that was withdrawn for a special federal purpose. Moreover, the motion accompanying the brief states (mot. at 3) that most of the individuals are operators of commercial fishing sites, which presumably would involve claims that are far more modest than those advanced by petitioners here. Indeed, amici concede (mot. at 4) that "[t]he interests of the fifty-nine 14(c) Claimants differ from that of Petitioners, in that *Donnelly Lee* were principally interested in obtaining broader relief in the courts below under the Homestead Act in order to receive title to more acreage than would be the case under ANCSA 14(c)."

have "occupied" on December 18, 1971, the relevant date under Section 14(c)(1) of ANCSA.[12]

In any event, the decision of the Ninth Circuit regarding the application of Section 14(c)(1) in the circumstances of this case does not conflict with the decision of any other court of appeals, since such claims to land in Alaska under ANCSA cannot arise in other federal circuits. Significantly, moreover, the only other case decided by the Ninth Circuit under Section 14(c)(1) involved persons who lawfully occupied the land in question under permits issued by the Forest Service (*Kavilco,* slip op. 13399), and the Ninth Circuit sustained their claims. Nor, contrary to petitioners' contention (88-533 Pet. 9; 88-549 Pet. 21), does the court of appeals' application of Section 14(c)(1) conflict with the decision of the Alaska Supreme Court in *Halaka.* The Alaska Supreme Court there construed the phrase "primary place of business" in Section 14(c)(1); it did not consider whether trespassers generally, or trespassers on withdrawn lands in particular, are eligible to receive title to the land under Section 14(c)(1). To the contrary, the court in *Halaka* described Section 14(c)(1) as affording protection to persons "who had previously utilized the lands in an established, *legal* and routine fashion" (753 P.2d at 1147 (emphasis added)). Finally, as noted above, neither *Kavilco* nor *Halaka* supports petitioners' invocation of Section 14(c)(1) to obtain title to their entire homestead claims, rather than to only the land under and immediately surrounding a residence or business establishment.

For the foregoing reasons, and because petitioners' homestead claims are not typical of those arising under Section 14(c)(1), review by this Court is not warranted.

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[12] Petitioner Donnelly, on the other hand, defied the notice of trespass and retained a residence within the withdrawn area on December 18, 1971 (Pet. App. 40a).

CONCLUSON

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

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